SEP 29 1988

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION I

DATE: September 26, 1988

SUBJ: Criteria for Determining RCRA Facility Owner/Operator Willingness

FROM: Ira Leighton, Chief
CT Waste Management Branch

TO: Merrill S. Hohman
Linda Murphy

RCRA Section Chiefs
CERCLA Section Chiefs
WMD Branch Chiefs

CT staff
Pls. read
will impact
our C.A.
work
JH

Hazardous waste sites subject to Subtitle C of RCRA cannot be proposed on the NPL unless it is clearly demonstrated that the owner/operator is unwilling to perform the cleanup. Attached please find a copy of the proposed revision to the existing criteria for establishing the willingness on the part of the owner/operator to perform the needed cleanup. Under the current policy, the only criterion EPA considers is whether the owner or operator has officially filed for bankruptcy.

Given the resource constraints in the RCRA program and the significance of the environmental problems associated with some Subtitle C sites, this policy will be important to Region I in terms of our ability to use all available authorities and sources of funding to attack the most significant environmental problems in the Region.

It is important to note that the Agency can conduct fund financed removals and RIFs actions prior to proposed listing on the NPL. The impact of the willingness test on these actions at Subtitle C sites looms as a significant policy call. The CT Branch has embarked on an effort to hold periodic state meetings where RCRA and CERCLA activities and priorities are discussed. We will continue to invite ESD to participate in these meetings as a means of coordinating our collective interests on RCRA/CERCLA activities.

Please do not hesitate to give me any thoughts or opinions you may have on this subject. It is my opinion that our geographic organizational format presents us with a unique opportunity to coordinate the interface between RCRA and CERCLA.

cc: Pam Hill
Don Porteous
Deb Pernice

federal register

Tuesday
August 9, 1988

Part III

Environmental Protection Agency

40 CFR Part 300
National Priorities List for Uncontrolled Hazardous Waste Sites; Policy Statements

ENVIRONMENTAL PROTECTION
NCY

CFR Part 300

[FRL-3426-6]

The National Priorities List for Uncontrolled Hazardous Waste Sites—Additions to Policy for Determining Inability-To-Pay for Sites Subject to the Subtitle C Corrective Action Authorities of the Resource Conservation and Recovery Act

AGENCY: Environmental Protection Agency.

ACTION: Policy statement for comment.

SUMMARY: The Environmental Protection Agency (EPA) is requesting comment on a policy relating to the National Oil and Hazardous Substances Contingency Plan (NCP), which EPA promulgated pursuant to Section 105 of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA) as amended by the Superfund Amendments and Reauthorization Act of 1986 (SARA), and Executive Order 12316.

CERCLA requires that the NCP include a list of national priorities among the known releases or threatened [illegible]ases of hazardous substances, [illegible]tants, and contaminants throughout [illegible]nited States, and that the list be revised at least annually. The National Priorities List (NPL), initially promulgated as Appendix B of the NCP on September 8, 1983, constitutes this list and meets those requirements.

Since the first NPL final rule (48 FR 40658, September 8, 1983), the Agency's policy has been to defer placing sites on the NPL that can be addressed by corrective action under Subtitle C of the Resource Conservation and Recovery Act (RCRA). This notice solicits comment on additional criteria for determining when the owner/operator of a site is considered unable to pay for addressing the contamination at a RCRA-regulated site, and therefore, the site should be proposed for the NPL. Elsewhere in today's Federal Register, the Agency is publishing a notice that discusses the policy for determining when RCRA facilities are unwilling to perform corrective action, and therefore, should be proposed for the NPL.

DATE: Comments may be submitted on or before October 11, 1988.

ADDRESSES: Comments on the inability criteria may be mailed to CERCLA Docket Clerk, Attn: Docket Number UL; Mail Code WH-548D, [illegible]fund Docket, Room LG-100, U.S. [illegible]ronmental Protection Agency, 401 M Street, SW., Washington, DC 20460. Please send three copies of comments.

FOR FURTHER INFORMATION CONTACT: Nancy Parkinson, RCRA Enforcement Division, Office of Waste Programs Enforcement (WH-527), U.S. Environmental Protection Agency, 401 M Street, SW., Washington, DC 20460, phone (800) 424-9346 or 382-3000 in the Washington, DC metropolitan area.

SUPPLEMENTARY INFORMATION:

Table of Contents

I. Introduction

In 1980, Congress enacted the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. Sections 9601-9657 (CERCLA or the Act), in response to the dangers of uncontrolled hazardous waste sites; CERCLA was amended in 1986 by the Superfund Amendments and Reauthorization Act (SARA). To implement CERCLA, the Environmental Protection Agency (EPA or the Agency) promulgated the revised National Oil and Hazardous Substances Contingency Plan (NCP), 40 CFR Part 300, on July 16, 1982 (47 FR 31180), pursuant to Section 105 of CERCLA and Executive Order 12316. The NCP, further revised by EPA on September 16, 1985 (50 FR 37624), and November 20, 1985 (50 FR 47912), sets forth guidelines and procedures needed to respond under CERCLA to releases or threatened releases of hazardous substances, pollutants, or contaminants.

Section 105(a)(8)(A) of CERCLA (as amended) requires that the NCP include criteria for determining priorities among releases or threatened releases throughout the United States for the purpose of taking remedial or removal action. Removal action involves cleanup or other actions that are taken in response to emergency conditions on a short-term or temporary basis (CERCLA Section 101(23)). Remedial action tends to be long-term in nature and involves response actions which are consistent with a permanent remedy (CERCLA Section 101(24)). The Agency developed the Hazard Ranking System (HRS) to implement CERCLA Section 105(a)(8)(A). The HRS was codified as Appendix A of the NCP on July 16, 1982 (47 FR 31219).

Section 105(a)(8)(B) of CERCLA (as amended) requires that the statutory criteria described in the HRS be used to prepare a list of national priorities among the known releases or threatened releases throughout the United States. The list, which is Appendix B of the NCP, is the National Priorities List (NPL). Section 105(a)(8)(B) also requires that the NPL be revised at least annually. An initial NPL of 406 sites was promulgated on September 8, 1983 (48 FR 40658). The NPL has been amended several times since then. Currently, there are 799 sites on, and 378 sites proposed to, the NPL.

II. Contents of this Policy

A. History of the Policy

Since the first NPL final rule (48 FR 40658, September 8, 1983), the Agency's policy has been to defer placing on the NPL sites that could be addressed by the corrective action authorities under Subtitle C of the Resource Conservation and Recovery Act (RCRA). Until 1984, the RCRA Subtitle C corrective action authorities were limited to facilities with releases to ground water from surface impoundments, waste piles, land treatment areas, and landfills that received RCRA hazardous waste after July 26, 1982, and did not certify closure prior to January 26, 1983 (i.e., land disposal facilities addressable by an operating or post-closure permit). Sites which met these criteria were placed on the NPL only if they were abandoned, lacked sufficient resources, or RCRA Subtitle C corrective action authorities could not be enforced. Those RCRA facilities where a significant portion of the release appeared to come from a nonregulated land disposal unit were also considered appropriate for listing.

On November 8, 1984, the Hazardous and Solid Waste Amendments of 1984 (HSWA) were enacted. HSWA greatly expanded RCRA Subtitle C corrective action authorities as follows:

- Section 3004(u) requires permits issued after the enactment of HSWA to include corrective action for all releases of hazardous waste or constituents from solid waste management units at treatment, storage, or disposal facilities seeking a permit;
- Section 3004(v) requires corrective action to be taken beyond the facility boundary where necessary to protect human health and the environment unless the owner/operator of the facility demonstrates that despite the owner or operator's best efforts, the owner or operator was unable to obtain the necessary permission to undertake such action; and
- Section 3008(h) authorizes the Administrator of EPA to issue an order requiring corrective action or such other response measure as deemed necessary to protect human health or the environment whenever it is determined that there is or has been a release of hazardous waste into the environment from a facility with interim status.

Because the expanded Subtitle C corrective action authorities of HSWA allowed EPA to address contamination at non-regulated units of RCRA

facilities, the Agency announced a draft revised policy which provided for the deferral from listing of RCRA sites unless the Agency determined that RCRA corrective action was not likely to succeed or occur promptly, due to factors such as:

- The inability or unwillingness of the owner/operator to pay for addressing the contamination at the site
- Inadequate financial responsibility guarantees to pay for such costs
- EPA or State priorities for addressing RCRA sites (50 FR 14118, April 10, 1985).

The Agency evaluated comments received on the draft policy, and on June 10, 1986 (51 FR 21059), announced its listing and deferral policy for non-Federal RCRA sites.[1] RCRA sites not subject to RCRA Subtitle C corrective action authorities would continue to be on the NPL. Some examples include:

Facilities that ceased treating, storing, or disposing of hazardous waste prior to November 19, 1980 (the effective date of Phase I of the RCRA regulations), and to which the RCRA corrective action authorities cannot be applied;

Sites at which only materials exempted from the statutory or regulatory definition of solid or hazardous waste were managed; and

RCRA hazardous waste handlers to which RCRA Subtitle C corrective action authorities do not apply, such as hazardous waste generators or transporters not required to have interim status or a final RCRA permit.

Further, the Agency stated that although sites that could be addressed by RCRA Subtitle C corrective action authorities generally would not be placed on the NPL, RCRA sites subject to corrective action should be listed in certain circumstances if the owners/operators of facilities are either unable or unwilling to take corrective action at sites. The Agency recognized that in such situations, it may be appropriate to place the sites on the NPL in order to make CERCLA funds available, if needed, for remedial action.[2]

[1] At that time, the Agency announced that it would consider at a later date whether this revised policy should apply to Federal facilities. On May 13, 1987 (52 FR 17991), the Agency announced its intent that Federal facilities should continue to be placed on the NPL regardless of their RCRA status.

[2] On June 24, 1988 (53 FR 23978), the Agency identified several other categories of RCRA facilities that are appropriate for the NPL. These facilities include converters, protective filers, non- or late-filers, and facilities with permits for the treatment, storage or disposal of hazardous waste issued prior to enactment of HSWA (where the owner/operator will not voluntarily modify the permit). Although the Agency has authority to compel RCRA corrective action at certain of these facilities (e.g., converters and non- or late-filers), the Agency has decided, for policy reasons, to clean up these sites using its CERCLA authority.

The Agency identified three categories of sites which, although subject to RCRA Subtitle C corrective action authorities, satisfy the unwillingness or inability criteria, and thus should be placed on the NPL:

(1) Facilities owned by persons who are bankrupt;

(2) Facilities that have lost authorization to operate and for which there are indications that the owner/operator has been unwilling to undertake corrective action; and

(3) Facilities that have not lost authorization to operate, but which have a clear history of unwillingness. These situations are determined on a case-by-case basis (51 FR 21054, June 10, 1986).

Also, on June 10, 1986, the Agency solicited comments on the types of sites that may have demonstrated an unwillingness to perform corrective action (51 FR 21111). The Agency suggested that sites meeting the following criteria might be placed on the NPL under the unwillingness category:

(1) Facilities whose owners or operators have not complied adequately with an administrative order, judicial action, or a RCRA permit condition requiring response or corrective action; and

(2) Facilities whose owners or operators have not submitted or implemented an adequate closure plan.

Elsewhere in today's **Federal Register**, the Agency is publishing a notice that discusses the policy for determining when RCRA facilities are unwilling to perform corrective action and therefore, should be proposed for the NPL.

III. Request for Comment on Inability Criteria

The Agency is soliciting comment today on that portion of the RCRA policy concerning the inability of an owner/operator to pay for cleaning up a RCRA-regulated site. Under the current policy, the sole financial criterion considered when an RCRA facility is proposed for the NPL is whether the owner/operator has formally invoked the protection of the bankruptcy laws. The Agency is concerned that this criterion may be unduly restrictive. It will not allow listing a site and proceeding with a CERCLA remedial action if an owner/operator has chosen not to invoke the protection of the bankruptcy laws and is willing and able to do some but not all of the cleanup work. Under such circumstances, RCRA authorities would fail to provide for complete cleanup, yet the site could not be placed on the NPL in a timely fashion.

The Agency is considering amending the RCRA policy to include an additional criterion that will allow placing an RCRA-related site on the NPL if the owner/operator is unable to pay for the cleanup proposed by EPA. EPS is also considering the possibility of allowing an RCRA facility that can demonstrate ability to pay to be deferred from the NPL.

Inability to Pay

The new inability to pay criterion that EPA is considering involves comparing the cost of the site remedy proposed by EPA with the financial viability of the owner/operator. The comparison (and subsequent listing, if appropriate) would only be made after an RCRA Facility Investigation (RFI) and Corrective Measures Study (CMS) for the facility are completed and an EPA-proposed remedy is publicly available; this would ensure that the cost of cleanup is fairly well established. EPA is proposed to place an RCRA site on the NPL if:

The estimated cost of the EPA-proposed remedy is greater than the tangible net worth of the owner/operator.

"Tangible net worth" means the tangible assets that remain after deducting liabilities; such assets would not include intangibles such as goodwill and rights to patents or royalties. *See*, e.g., 40 CFR 265.141(f).

To implement such a policy, the Agency would be required to consider various types of financial information. As a general rule, the Agency is considering relying on publicly available financial information, such as Securities and Exchange Commission 10K or 10Q reports and financial information provided to State and local governments. If the information available from such sources is inadequate, the Agency is considering seeking financial information through the use of CERCLA Section 104(e). Section 104(e)(2)(C) specifically allows EPA to send information request letters relating to a person's ability to pay for or perform a cleanup of the site. EPA is requesting comment on using these sources, as well as comment on the possibility of using other information, such as that available from financial reporting firms such as Dunn & Bradstreet.

EPA believes that a comparison of tangible net worth to the cost of the EPA-proposed remedy represents the best approach, especially if EPA's selection is not appealed and thus takes effect quickly. The Agency recognizes, however, that the owner/operator or a citizen's group may successfully challenge EPA's selection, and a lower cost option—one that the facility could afford to pay—might eventually be

selected. To accommodate such situations, EPA is soliciting comment on alternative to the criterion outlined above. Under that alternative EPA would place an RCRA site on the NPL if:

The estimated cost of a) the least expensive remedy considered in the CMS (excluding "no action"), or b) the remedy ultimately selected after any appeals, is greater than the tangible net worth of the owner/operator.

This alternative is more conservative than the first option in that it considers the possibility that the owner/operator might be able to pay for a less costly remedy than that proposed by EPA and that the less costly remedy might eventually be selected. This alternative, however, could delay listing a site until the completion of the appeal process if the remedy proposed by EPA (or a more expensive remedy) is ultimately chosen after an appeal, and the owner/operator is unable to pay for that remedy.

This alternative also excludes the "no-action" remedy from the comparison with tangible net worth. Under the NCP (40 CFR 300.68(f)(1)(v)), the Agency must, in most CERCLA cases, consider a zero-cost, "no action" remedy. RCRA guidance generally requires consideration in the CMS of similar "no-action" remedies. In such cases, the "no-action" remedy would clearly constitute the "least expensive remedy considered"; thus, no sites could be listed on the basis of inability to pay if the "no-action" remedy were considered in the comparison. As a result, the Agency believes it is appropriate to exclude the "no-action" remedy from the comparison with tangible net worth.

Ability to Pay

To supplement either of the two alternatives under consideration, EPA believes that it may be appropriate to defer the listing of an RCRA site if an owner/operator demonstrates ability to fund all cleanup costs. Therefore, EPA is proposing to defer placing an RCRA site on the NPL if:

The owner/operator posts a surety bond or letter of credit guaranteeing payment of EPA's proposed remedy.

The Agency requires similar financial instruments for assuring sufficient funds for RCRA site closure and post-closure. See 40 CFR 265.143 (b) and (c).

EPA requests comment on these criteria to determine if a site owner/operator is unable to fund cleanup costs.

Date: August 3, 1988.

J.W. McGraw,

Acting Assistant Administrator, Office of Solid Waste and Emergency Response.

[FR Doc. 88-17926 Filed 8-8-88; 8:45 am]

BILLING CODE 6560-50-M

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 300

[FRL-3415-7]

The National Priorities List for Uncontrolled Hazardous Waste Sites—Criteria for Determining Unwillingness for Sites Subject to the Subtitle C Corrective Action Authorities of the Resource Conservation and Recovery Act

AGENCY: Environmental Protection Agency.

ACTION: Policy statement.

SUMMARY: The Environmental Protection Agency (EPA) is publishing a policy relating to the National Oil and Hazardous Substances Contingency Plan (NCP), which EPA promulgated pursuant to Section 105 of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA) as amended by the Superfund Amendments and Reauthorization Act of 1986 (SARA), and Executive Order 12316.

CERCLA requires that the NCP include a list of national priorities among the known releases or threatened releases of hazardous substances, pollutants, and contaminants throughout the United States, and that the list be revised at least annually. The National Priorities List (NPL), initially promulgated as Appendix B of the NCP on September 8, 1983, constitutes this list and meets those requirements.

Since the first NPL final rule (48 FR 40658, September 8, 1983), the Agency's policy has been to defer placing sites on the NPL that can be addressed by corrective action under Subtitle C of the Resource Conservation and Recovery Act (RCRA). This notice today discusses the Agency's policy for determining when such RCRA facilities are unwilling to perform corrective action, and therefore, should be proposed for the NPL. Relevant comments received in response to the June 10, 1986, **Federal Register** notice (51 FR 21109) that requested comment on proposed components of the NPL policy regarding RCRA-related sites will be available for public viewing at the Superfund Docket, Room LG-100, U.S. Environmental Protection Agency, 401 M Street SW., Washington, DC 20460. Comments may be viewed by appointment only, from 9:00 a.m. to 4:00 p.m., Monday through Friday, excluding Federal holidays, phone (800) 424-9346 or 382-3046 in the Washington, DC metropolitan area.

Elsewhere in today's **Federal Register**, the Agency is soliciting comment on additional criteria for determining when the owner/operator of a site is considered unable to pay for addressing the contamination at a RCRA-regulated site, and therefore, the site should be proposed for the NPL.

EFFECTIVE DATE: The effective date for this policy shall be September 8, 1988.

FOR FURTHER INFORMATION CONTACT: Nancy Parkinson, RCRA Enforcement Division, Office of Waste Programs Enforcement (WH-527), U.S. Environmental Protection Agency, 401 M Street SW., Washington, DC 20460, phone (800) 424-9346 or 382-3000 in the Washington, DC metropolitan area.

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I. Introduction

In 1980, Congress enacted the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. Sections 9601-9657 (CERCLA or the Act), in response to the dangers of uncontrolled hazardous waste sites; CERCLA was amended in 1986 by the Superfund Amendments and Reauthorization Act (SARA). To implement CERCLA, the Environmental Protection Agency (EPA or the Agency) promulgated the revised National Oil and Hazardous Substances Contingency Plan (NCP), 40 CFR Part 300, on July 16, 1982 (47 FR 31180), pursuant to Section 105 of CERCLA and Executive Order 12316. The NCP, further revised by EPA on September 16, 1985 (50 FR 37624), and November 20, 1985 (50 FR 47912), sets forth guidelines and procedures needed to respond under CERCLA to releases or threatened releases of hazardous substances, pollutants, or contaminants.

Section 105(a)(8)(A) of CERCLA (as amended) requires that the NCP include criteria for determining priorities among releases or threatened releases throughout the United States for the purpose of taking remedial or removal action. Removal action involves cleanup or other actions that are taken in response to emergency conditions on a short-term or temporary basis (CERCLA Section 101(23)). Remedial action tends to be long-term in nature and involves response actions which are consistent with a permanent remedy (CERCLA Section 101(24)). The Agency developed the Hazard Ranking System (HRS) to implement CERCLA Section 105(a)(8)(A). The HRS was codified as Appendix A of the NCP on July 16, 1982 (47 FR 31219).

Section 105(a)(8)(B) of CERCLA (as amended) requires that the statutory criteria described in the HRS be used to prepare a list of national priorities among the known releases or threatened releases throughout the United States. The list, which is Appendix B of the NCP, is the National Priorities List (NPL). Section 105(a)(8)(B) also requires that the NPL be revised at least annually. An initial NPL of 406 sites was promulgated on September 8, 1983 (48 FR 40658). The NPL has been amended several times since then. Currently, there are 799 sites on, and 378 sites proposed to, the NPL.

II. Contents of This Policy

A. History of the Unwillingness Policy

Since the first NPL final rule (48 FR 40658, September 8, 1983), the Agency's policy has been to defer placing on the NPL sites that could be addressed by the corrective action authorities under Subtitle C of the Resource Conservation and Recovery Act (RCRA). Until 1984, the RCRA Subtitle C corrective action authorities were limited to facilities with releases to ground water from surface impoundments, waste piles, land treatment areas, and landfills that received RCRA hazardous waste after July 26, 1982, and did not certify closure prior to January 26, 1983 (i.e., land disposal facilities addressable by an operating or post-closure permit). Sites which met these criteria were placed on the NPL only if they were abandoned, lacked sufficient resources, or RCRA Subtitle C corrective action authorities could not be enforced. Those RCRA facilities where a significant portion of the release appeared to come from a nonregulated land disposal unit were also considered appropriate for listing.

On November 8, 1984, the Hazardous and Solid Waste Amendments of 1984 (HSWA) were enacted. HSWA greatly expanded RCRA Subtitle C corrective action authorities as follows:

- Section 3004(u) requires permits issued after the enactment of HSWA to include corrective action for all releases of hazardous waste or constituents from solid waste management units at treatment, storage, or disposal facilities seeking a permit;
- Section 3004(v) requires corrective action to be taken beyond the facility boundary where necessary to protect human health and the environment unless the owner/operator of the facility demonstrates that despite the owner or operator's best efforts, the owner or operator was unable to obtain the necessary permission to undertake such action; and
- Section 3008(h) authorizes the Administrator of EPA to issue an order

requiring corrective action or such other response measure as deemed necessary to protect human health or the environment whenever it is determined that there is or has been a release of hazardous waste into the environment from a facility with interim status.

Because the expanded Subtitle C corrective action authorities of HSWA allowed EPA to address contamination at non-regulated units of RCRA facilities, the Agency announced a draft revised policy which provided for the deferral from listing of RCRA sites unless the Agency determined that RCRA corrective action was not likely to succeed or occur promptly, due to factors such as:

- The inability or unwillingness of the owner/operator to pay for addressing the contamination at the site
- Inadequate financial responsibility guarantees to pay for such costs
- EPA or State priorities for addressing RCRA sites (50 FR 14118, April 10, 1985).

The Agency evaluated comments received on the draft policy, and on June 10, 1986 (51 FR 21059), announced its listing and deferral policy for non-Federal RCRA sites.[1] RCRA sites not subject to RCRA Subtitle C corrective action authorities would continue to be on the NPL. Some examples include:

Facilities that ceased treating, storing, or disposing of hazardous waste prior to November 19, 1980 (the effective date of Phase I of the RCRA regulations), and to which the RCRA corrective action authorities cannot be applied;

Sites at which only materials exempted from the statutory or regulatory definition of solid or hazardous waste were managed; and

RCRA hazardous waste handlers to which RCRA Subtitle C corrective action authorities do not apply, such as hazardous waste generators or transporters not required to have interim status or a final RCRA permit.

Further, the Agency stated that although sites that could be addressed by RCRA Subtitle C corrective action authorities generally would not be placed on the NPL, RCRA sites subject to corrective action should be listed in certain circumstances if the owners/operators of facilities are either unable or unwilling to take corrective action at sites. The Agency recognized that in such situations, it may be appropriate to place the sites on the NPL in order to make CERCLA funds available, if needed, for remedial action.[2]

The Agency identified three categories of sites which, although subject to RCRA Subtitle C corrective action authorities, satisfy the unwillingness or inability criteria, and thus should be placed on the NPL:

(1) Facilities owned by persons who are bankrupt;

(2) Facilities that have lost authorization to operate and for which there are indications that the owner/operator has been unwilling to undertake corrective action; and

(3) Facilities that have not lost authorization to operate, but which have a clear history of unwillingness. These situations are determined on a case-by-case basis (51 FR 21054, June 10, 1986).

Also, on June 10, 1986, the Agency solicited comments on the types of sites that may have demonstrated an unwillingness to perform corrective action (51 FR 21111). The Agency suggested that sites meeting the following criteria might be placed on the NPL under the unwillingness category:

(1) Facilities whose owners or operators have not complied adequately with an administrative order, judicial action, or a RCRA permit condition requiring response or corrective action; and

(2) Facilities whose owners or operators have not submitted or implemented an adequate closure plan.

B. Revisions to the Unwillingness Policy

Today, the Agency is announcing its decision on additional criteria to determine unwillingness. As a general matter, the Agency would prefer using available RCRA enforcement or permitting authorities to require corrective action [3] by the owner/operator at RCRA sites because this would help to conserve CERCLA resources for sites where no financially viable owner/operator is available.[4]

However, when the Agency determines that a RCRA facility owner/operator is unwilling to adequately carry out corrective action activities directed by EPA or a State pursuant to an order or permit, there is little assurance that releases will be addressed in a timely or environmentally sound manner under a RCRA order or permit. Therefore, such RCRA facilities should be listed in order to make CERCLA resources available expeditiously. RCRA facilities will be placed on the NPL based on unwillingness when owners/operators are not in compliance with one or more of the following:

- Federal or substantially equivalent State unilateral administrative order requiring corrective action, after the facility owner/operator has exhausted administrative due process rights;
- Federal or substantially equivalent State unilateral administrative order requiring corrective action, if the facility owner/operator did not pursue administrative due process rights within the specified time period;
- Initial Federal or State preliminary injunction or other judicial order requiring corrective action;
- Federal or State RCRA permit condition requiring corrective action after the facility owner/operator has exhausted administrative due process rights; or
- Final Federal or State consent decree or administrative order on consent requiring corrective action, after the exhaustion of any dispute resolution procedures.

For unilateral order authorities which do not expressly provide for administrative due process rights (e.g., RCRA Sections 7003 and 3013 and CERCLA Section 106), or for those instances where the Agency is proceeding with a civil action (e.g., under RCRA Section 3008(h)), an owner/operator who has been issued a preliminary injunction or other judicial order requiring corrective action, and is not in compliance with that order, will be considered unwilling.

These criteria clarify and expand the first of the two unwillingness criteria proposed on June 10, 1986 (51 FR 21111). After reviewing comments, the Agency decided not to consider the second of the two unwillingness criteria proposed on June 10, 1986, which related to the submittal and implementation of closure plans.

The Agency believes that the criteria announced today will provide a more objective and systematic means of determining unwillingness. Furthermore, the criteria respond to concerns that the due process rights of owners and operators should be protected. Using the new criteria, a facility owner/operator will not be declared to be unwilling

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[1] At that time, the Agency announced that it would consider at a later date whether this revised policy should apply to Federal facilities. On May 13, 1987 (52 FR 17991), the Agency announced its intent that Federal facilities should continue to be placed on the NPL regardless of their RCRA status.

June 24, 1988 (53 FR 23978), the Agency ...d several other categories of RCRA ... that are appropriate for the NPL. These facilities include converters, protective filers, non- or late-filers, and facilities with permits for the treatment, storage or disposal of hazardous waste issued prior to enactment of HSWA (where the owner/operator will not voluntarily modify the permit). Although the Agency has authority to compel RCRA corrective action at certain of these facilities (e.g., converters and non- or late-filers), the Agency has decided, for policy reasons, to clean up these sites using its CERCLA authority.

[2] For purposes of this policy, corrective action may include but not be limited to, interim measures, removal actions, studies and the implementation of corrective measures or remedial actions. An owner/operator's refusal to perform a study for example, may by itself indicate a general unwillingness to take corrective action; however, that determination should not be automatic but should be made in the broader context of the case, taking into account such factors as the extent of studies already done at the site and the reasons for requiring a study.

[4] The Agency may also decide to use CERCLA Sections 104(b) or 106 authorities at RCRA sites in order to obtain cleanup from potentially responsible parties other than the RCRA owner or operator, as appropriate. A site need not be on the NPL to use these authorities; however, a site must be on the NPL for CERCLA-funded remedial actions.

based simply on the issuance of an administrative order, for example. The owner/operator will have the opportunity to pursue administrative appeal rights, and only if the Agency's decision is upheld and the owner/operator still refuses to comply with the order, will the determination of unwillingness be made. Similarly, in a judicial order context, an owner/operator will not be declared to be unwilling until after refusal to comply with an initial judicial order requiring corrective action. The Agency believes that this approach addresses due process concerns while allowing the NPL proposal and promulgation process to continue and any corrective action deemed necessary to get underway without undue delay that could be prejudicial to the protection of human health and the environment.

III. Non-Applicability of Revised Unwillingness Criteria to RCRA Sites Currently Proposed for the NPL

There are several RCRA facilities that are currently proposed for placement on the NPL, based upon their HRS scores and EPA's determination that the owner/operators were unwilling to take corrective action at the site. For each such site, the Agency made, prior to proposal, a case-by-case determination of the owner/operator's unwillingess to perform corrective action, consistent with the Agency's policy as announced on June 10, 1986, and EPA believes that the sites are appropriate for placement on the NPL.

EPA believes it would be inappropriate to go back and reexamine such already proposed sites based on the revised unwillingness criteria in today's notice for several reasons. First, the revised unwillingness criteria had not yet been announced at the time the currently-proposed sites were evaluated for unwillingess and proposed for NPL listing. Second, the new criteria do not represent a substantive change in EPA's policy of listing unwilling RCRA sites but rather, represent an attempt at developing objective criteria that can be more easily applied and understood. (As noted above, EPA believes that the determination made for the proposed sites still satisfy the Agency's policy and goals.) Third, the Agency recognizes that the Regions and States may, in order to meet the new objective criteria, be required in the future to issue corrective action orders at many RCRA sites before determining if an owner/operator is unwilling, rather than evaluating all evidence on a case-by-case basis; some lead time needs to be allowed for the Regions and States to understand the new criteria and apply them to sites submitted to EPA Headquarters for NPL proposal. A decision to apply the new criteria to already proposed sites could significantly delay the listing and response action at those sites unnecessarily. Thus, the criteria announced today will only be applied to sites proposed after the date of this notice.

IV. Response to Public Comments

No commenters addressed the Agency's June 10, 1986, request for suggestions on additional categories of RCRA facilities that should not be deferred from listing based on unwillingness to perform corrective action.

Seven commenters provided suggestions on the notice regarding circumstances where the Agency should determine that a facility's owner/operator is unwilling to perform corrective action.

One commenter suggested that failure to reach an agreement regarding corrective action through either an order or permit within a specified amount of time should result in placing a site on the NPL. If a consent order is the mechanism to be used, the goal would be a signed, completed order within the specified time frame. If a permit is the mechanism used, then permit conditions would be agreed upon and the owner/operator would agree to withhold any challenges to those conditions when a permit is issued. Failure to reach agreement by a specified deadline would result in listing.

In response, the Agency recognizes that it is important not to delay cleanup at any sites that are deferred from listing. Setting a specified time frame for reaching an agreement regarding corrective action through a consent order before CERCLA monies would be spent could help achieve that goal.

The Agency is currently developing the guidance for determining when during the enforcement process a deferred RCRA facility should again be considered for the NPL and for a CERCLA-financed remedial investigation/feasibility study (RI/FS). This guidance will set out for the owner/operator a process for the negotiation and appeal of the order, and will specify the point at which the Agency will consider the facility for the NPL and a CERCLA-financed RI/FS. The Agency agrees with the concept that a failure to reach an agreement should result in listing. However, the Agency intends to use a set point in the appeal process to determine unwillingness instead of a set time frame, in consideration of due process appeal rights.

One commenter stated the unwillingness policy puts the owner/operator of a site in the untenable position of stating its inability or unwillingness to comply with the law that may be applicable under RCRA in order to obtain enforcement, cleanup and equitable cost sharing under CERCLA. Where financially sound potentially responsible parties (PRPs) have been identified, notified, and involved, and where activities are underway at a site pursuant to CERCLA, the policy should include a presumption that such activities proceed to completion under CERCLA.

In response, a site need not be on the NPL for CERCLA enforcement authorities to be used, and these authorities can be used to obtain cleanup from PRPs other than the owner or operator, as appropriate. The general intent of this policy is to pursue RCRA and CERCLA enforcement authorities first rather than expending Fund moneys at RCRA sites. The Agency has long maintained that both RCRA and CERCLA authorities can be used to respond at a site (see, for example, the National RCRA Corrective Action Strategy).

Two commenters suggested that the criteria to determine unwillingness clarify that unwillingness to perform corrective action includes unwillingness to comply with State-issued corrective action orders. One commenter suggested that the terms administrative order, judicial action, RCRA permit condition, and adequate closure plan be defined to include analogous actions by authorized States. The other commenter noted that in some situations the lead agency for implementing the cleanup procedures is a State agency, and that unwillingness to comply with an administrative order, judicial action, or permit condition requiring response or corrective action from the State agency is analogous to unwillingness to comply with Federal RCRA authority.

In response, the Agency has decided that unwillingness means noncompliance with State administrative orders requiring corrective action and permit conditions substantially equivalent to those under RCRA. The Agency does not believe that it is necessary to define substantially equivalent in the Federal Register. Rather, this term will be further explained in the guidance to this policy.

One commenter suggested an alternative for unwillingness would be to make all "failed" RCRA sites, i.e., those sites where RCRA enforcement may not be able to result in the desired remedy, automatically eligible for the NPL, so as to assure that appropriate remedial actions can be provided.

In response, EPA notes that the process for developing a RCRA corrective action order now provides for Interim Measures, RCRA Facility Investigations, Corrective Measure Studies, and Corrective Measure Implementations. This process is very similar to the development of a remedy under CERCLA, and will most often result in a desired remedy. The Agency believes the current policy, which allows a RCRA site to be placed on the NPL based on inability (i.e., bankruptcy) or unwillingness of the owner/operator to perform corrective action, assures that "failed" RCRA sites can be cleaned up.

One commenter suggested that where a commitment has been made to manage RCRA sites under CERCLA on a regional scale, they should continue to be handled under CERCLA. Specifically, sites that are part of an area where CERCLA funds have been used to begin regional planning and management should not be deferred from the NPL.

In response, the Agency does not agree that sites that are part of an area where CERCLA funds have been used to begin regional planning and management should be a criterion for placing sites on the NPL. The Agency's intent is to first use available enforcement authorities to secure corrective action at RCRA sites rather than expend Fund moneys. RCRA and CERCLA authorities can be used in a consistent manner to address sites on a regional scale. The Agency will, on a case-by-case basis, review the need for a comprehensive oversight strategy in cases requiring integrated CERCLA/RCRA interaction.

One commenter suggested that a RCRA site should be listed if the contamination on the property is the result of past on-site disposal of hazardous substances by a third party that was neither related to nor caused by the operation of the permittee. The commenter believes it is not appropriate to apply RCRA corrective action requirements to the current owner of a site where the basis of RCRA jurisdiction for that site is independent of the contamination caused by pre-existing disposal of hazardous substances by a third party.

In response, EPA notes that the current owner/operator under RCRA is liable for cleanup of contamination existing on the site. 40 CFR 270.72(d) states that, with the exception of financial requirements, all "interim status duties are transferred effective immediately upon the date of the change of ownership or operational control of the facility." Therefore, the Agency does not agree that this should be a criterion for placing RCRA sites on the NPL.

One commenter believed that the mere issuance of an administrative order or the initiation of a judicial action should not serve as a criterion for unwillingness, and the failure to comply with a permit condition was less of a justification. The commenter felt such criteria encouraged a RCRA-regulated party to shift to CERCLA management in order to spread the responsibility to former customers, and to defer actual payment of cleanup costs. The commenter recognized there may be delays in awaiting a determination from an administrative law judge or a court, but that this would not be a problem in emergency situations where the Agency could use its CERCLA removal authorities (or RCRA Section 7003 authorities) without the site being on the NPL.

In response, the Agency agrees that mere issuance of an administrative order or judicial order should not automatically result in a determination of unwillingness. The criteria developed do allow for the exercise of the owner/operator's due process rights before the Agency can make a determination of unwillingness.

One commenter stated the proposed unwillingness criteria were too vague and could result in the addition of so many sites that the CERCLA program would be overwhelmed. The commenter stated that where emergency actions are needed to protect human health and the environment, they could be taken as part of a CERCLA removal action. The commenter stated the Agency should defer listing of sites subject to RCRA regulation or enforcement until final decisions on sites are made. This deferral should apply to RCRA sites that are in litigation as this could be interpreted as an effort to influence the outcome of the case.

In response, the Agency does not believe that the criteria will result in the listing of too many sites. In fact, the Agency believes the NPL/RCRA policy will result in focusing the Agency's CERCLA resources on the most appropriate sites. In addition, the Agency is adding more specificity to the criteria for determining unwillingness in this notice. The criteria for determining unwillingness do allow for the listing of a facility after an initial judicial order requiring corrective action. This criterion may result in the listing of a site currently undergoing litigation. However, the Agency believes this policy is appropriate because it strikes a balance between exercise of the owner/operator's due process rights, and the need to protect human health and the environment. Finally, the decision to use removal authorities is not constrained by these listing criteria, since removals can be conducted on any site.

V. Application of Policy to Final NPL Sites

On June 10, 1986 (51 FR 21109), the Agency stated its intent to apply the RCRA listing policy to RCRA sites that are already on the final NPL. The Agency invited the owners or operators of facilities on the proposed or final NPL, or other persons, to provide information that would assist EPA in evaluating this draft policy.

Two commenters provided suggestions on items to be considered when applying the RCRA deferral policy to final sites. One commenter provided factors which should be addressed if deletion of final sites on the NPL is considered. The factors include: the length of time the facility has been on the NPL; whether PRPs have been identified; if PRPs have not been identified, can they be; are the PRPs financially sound; have EPA or any PRP taken any actions at the facility under CERCLA, and, if so, what actions; do the size, complexity, and toxicity of the site suggest such a large response cost that CERCLA enforcement will result in a more expeditious, thorough, and cost-effective cleanup; have CERCLA monies been spent, how much, for what purpose, and for how long; will additional CERCLA expenditures be required; will CERCLA monies spent be repaid; have PRPs spent money at the site; were PRP funds spent pursuant to an enforcement order or agreement; are further PRP expenditures expected.

In response, the Agency believes that it could consider many of the factors described by the commenter to determine if the RCRA listing policy should be applied to a site on the final NPL. Factors such as these can be important in determining the extent of CERCLA involvement at a site, and whether the owner/operator of the facility is addressing the contamination at the site through the RCRA corrective action authorities.

Another commenter suggested that the criteria for deleting a final RCRA site from the NPL should not be different from those determining eligibility. Therefore, the commenter felt RCRA-regulated facilities ought to be removed

from the NPL if they no longer meet the criteria for listing, and that to do otherwise would inequitably treat already listed sites in comparison to newly proposed sites.

In response, EPA believes it may be appropriate to apply different criteria to RCRA sites that are on the final NPL, as compared to sites that have merely been proposed. For final NPL sites, the Agency has completed its listing process, CERCLA actions are underway, and the public anticipates CERCLA response. EPA does not believe that applying different criteria to final RCRA sites that may be deleted will cause any significant prejudice to any party.

Finally, the Agency received comments from two RCRA facilities currently on the NPL. Both have signed consent orders to perform a remedial investigation/feasibility study (RI/FS). One commenter indicated the facility did not want to be removed from the NPL because doing so "would only hamper the progress being made there." The other commenter indicated the facility should be allowed to complete the RI/FS currently in progress before deletion from the NPL was considered, not wanting a change in program administration to cause any delay or duplication of work underway.

In response, the Agency agrees that a change in program administration could be disruptive of work at sites where actions have already been begun.

Based on the comments received and discussions within the Agency, EPA intends to apply the RCRA deferral policy prospectively. EPA does not intend to go back and systematically review final RCRA sites on the NPL to determine whether they are being addressed through corrective action under RCRA for purposes of removing them from the final NPL. The Agency believes such a review would be time consuming, thereby detracting from more important work of the CERCLA program, and could disrupt work at sites where CERCLA actions have already begun. However, in certain limited cases where the owner/operator demonstrates that the corrective measures phase is progressing adequately under a Federal RCRA corrective action order, for example, and demonstrates that the technical and compliance schedule requirements of the RCRA order or permit are being met, it may be appropriate to remove the site from the final NPL before the cleanup is complete.

The Agency is currently reviewing how such a policy should be applied. Because the resolution of this issue could have important implications on Agency procedures and resources, EPA plans to discuss criteria for the removal of final RCRA sites in the context of the general NPL deferral policy. This general policy will be discussed in the upcoming revisions to the National Oil and Hazardous Substances Pollution Contingency Plan.

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